

## Chapter 1

# Family Companies and Family Constitutions: Historical and Comparative Perspectives

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### Abstract

This chapter provides an introduction to the world of family companies and family constitutions from a legal perspective. It first studies the legal types of business organizations that family firms have chosen across time and jurisdictions. It then illustrates how early predecessors of family constitutions evolved in the late Middle Ages and what modern family constitutions look like in different countries today. Further considerations are devoted to the governance framework of family firms. The chapter concludes by exploring the potential legal effects of family constitutions under German company and contract law.

*Keywords:* Family constitution; comparative legal perspective on the family constitution; early precursors of the family constitution; family constitution and German company law; standardization of the family constitution

### 1.1. The Rise of Family Constitutions and Legal Research

Family constitutions are becoming more and more fashionable in Germany, Europe, and around the globe. Our conference seeks to contribute to a better

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understanding of this new governance instrument. So far, in-depth research has largely come from the field of management studies. Legal scholarship, on the other hand, is lagging behind. The analysis of family constitutions through the lens of company and contract law is still in its early days. Recently, however, a couple of law review articles (Bochmann & Driftmann, 2022; Fleischer, 2016, 2017, 2018; Foerster, 2019; Holler, 2018; Lange, 2013; Reich & Bode, 2018; Uffmann, 2015) and two doctoral theses<sup>1</sup> have been published, so that further progress is in sight.

With this caveat, the following chapter explains how a business lawyer would consider the remarkable rise of family constitutions. Leaving aside doctrinal details, it traces the historical and comparative developments of family companies in general and family constitutions in particular. It first studies the legal types of business organization that family firms have chosen across time and jurisdictions (Section 1.2). Then it demonstrates that modern family constitutions have early precursors, namely the house laws of the high nobility and the guidelines of the moneyed aristocracy. This is followed by a comparative tour through family constitutions in different jurisdictions: United States, France, Spain, Belgium, Germany, and Italy (Section 1.3). After that, family constitutions are located within the governance framework for family firms (Section 1.4). Finally, family constitutions and their potential legal implications are analyzed more closely in the light of German company and contract law (Section 1.5).

## 1.2. Family Firms and Legal Forms

Family businesses can be classified according to various criteria: age, sector, size, strength of family influence, or economic and financial key figures.<sup>2</sup> Another taxonomy could be organized around different types of owners in the lifecycle of the firm: founder and sole owner, sibling company, cousin consortium, and family dynasty.<sup>3</sup> A trained lawyer would probably first look at the legal form of the family enterprise. This is because in the world of corporate law there is no family company as such, i.e., no specific codified form for family businesses,<sup>4</sup> but only a family partnership, family limited liability company, family stock corporation, family limited partnership, family foundation, etc. Four spotlights will illustrate which legal forms family businesses have chosen for their respective purposes across time and national borders. In doing so, it will become apparent that family firms have contributed significantly to the shaping of company law with their gradual development from a house community to a trading company.

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<sup>1</sup>Bong (2022); Hueck (2017); for a doctoral thesis in the field of management studies recently, Neumueller and Henry (2020).

<sup>2</sup>See the classifications in Davies (2008), Pieper and Klein (2007), and Sharma and Nordquist (2008).

<sup>3</sup>For example, May and Koeberle-Schmid (2011, p. 661 et seq.); also Gersick et al. (1997, p. 17).

<sup>4</sup>Aptly, Kalss and Probst (2013, p. 115): “no codified company law for family businesses.”

### 1.2.1. Family Firms as First Users of the Roman *Societas*

According to widespread understanding, the roots of partnership arrangements in Roman law go back to the pre-classical *consortium*.<sup>5</sup> In the old days, after the death of the *paterfamilias*, all his household heirs remained united in a community of co-heirs, the so-called *consortium ercto non cito*, through which the family continued to exist. Individual heirs did not have a specific part in the inheritance; instead, all rights were vested in the community of co-heirs. Over the course of time, partners who wanted to form a profit-oriented business partnership were allowed to enter into a classical partnership (*societas*) on the model of the co-heirs of an undivided family (see Zimmermann, 1990, p. 452). This type of partnership was often referred to as partnership of brothers (*societas fratrum*).<sup>6</sup> Against this historical background, it can be rightly stated that family businesses – especially in the form of the jointly continuing household heirs (*heredes*) – were the first users of the Roman *societas* and of partnership law in general (see Fleischer, 2017, p. 1202).

### 1.2.2. Family Firms as Promoters of the Medieval *Compagnia*, *Accomenda* and *OHG* (*Medici*, *Fugger*)

In the Middle Ages, most trading houses had the character of family businesses as well.<sup>7</sup> Their names were all family names (Peruzzi, Bardi, Medici, Welser, Fugger),<sup>8</sup> their partners were mostly close relatives who teamed up to form trading partnerships with joint and several liability.<sup>9</sup> This happened first in the cities of northern Italy, where the so-called *compagnia* emerged in the 14th century.<sup>10</sup> Its very name – translated: community of bread<sup>11</sup> – indicates its preferred use

<sup>5</sup>See Wieacker (1936, p. 126 et seq.); more recently, Zimmermann (1990, p. 451 et seq.).

<sup>6</sup>In this sense, the subheading in Meissel (2004, p. 91), paraphrasing a text by Gaius speaking of a “*societas ad exemplum fratrum suorum*”; also Wieacker (1936, p. 152): “*fraternitas of the partners*.”

<sup>7</sup>In-depth, M. Weber (1889, p. 44 et seq.) under the chapter heading “The Family and Working Communities”; further Kuntze (1863, p. 183): “The family is also in the world of commerce the natural starting point for the development of the commercial company.”; Lastig (1879, p. 431 et seq.).

<sup>8</sup>On this, Kuntze (1883, p. 184 et seq.).

<sup>9</sup>More closely, Mehr (2008, p. 55 et seq.), who traces the roots of these family, household and inheritance communities back to the *Lex Langobardorum* from the seventh century.

<sup>10</sup>In summary, Fleischer (2021c: § 1 marg. no. 128 et seq.).

<sup>11</sup>Derived from the Latin “*cum pane*”; on this, for example, Goldschmidt (1891, p. 272 with fn. 131); further Hawk (2016, p. 210): “[T]he medieval Italian *compagnia* originally reflected small family relationships between father and son or among several brothers – men who lived in the same house, who broke the same bread (as the word *compagno* implies) and who found it natural to accept unlimited liability for each other’s actions.”

as a legal form for family businesses.<sup>12</sup> The Medici, for example, resorted to it when they founded their Florentine banking house in 1397 at the instigation of Giovanni di Bicci de' Medici (1360–1429).<sup>13</sup> Unlike other banking families of their time, such as the Bardi or Peruzzi, who conducted all their business under the legal umbrella of a single *compagnia*,<sup>14</sup> the Medici Empire was structured as a group of partnerships.<sup>15</sup> At the top, there was a main partnership made up of family members and one or two non-family partners (see McCarthy, 1994, p. 13). It in turn owned majority stakes in various subsidiaries, subject to strict control by the main partnership.<sup>16</sup> All this is exemplified by the partnership agreement of the Bruges subsidiary of July 25, 1455.<sup>17</sup>

But the Medici not only knew how to use the *compagnia*, they sometimes also sought to limit risk in the expansion of their business. In doing so, they made use of a Florentine law of November 30, 1408, which allowed the foundation of an *accomenda* or *società in accomandita*, in which some of the partners had only limited liability (see Goldschmidt, 1891, p. 271; also Goldthwaite, 2009, p. 67) – the Italian archetype of today's limited partnership.<sup>18</sup> An example that has come down to us is the partnership agreement of 1422 on the founding of a bank in Naples, to which the partners of the Medici bank contributed a (limited) sum of 3,200 florins and were thus, according to the partnership agreement, exempt from

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<sup>12</sup>See Schmidt (1883, p. 8): “In fact, the largest and most famous trading companies of the later Middle Ages grew up on the soil of the family; they are large manorial estates continued through a series of generations. [...] The close bond of trust which embraced the partners gave these companies a special support and enabled them to carry out undertakings for which companies based solely on contracts were not equally suited.”

<sup>13</sup>More closely, de Roover (1946, p. 28 et seq.); McCarthy (1994, p. 10 et seq.).

<sup>14</sup>See de Roover (1946, p. 28): “The essential feature of the form of organization exemplified by the Bardi and the Peruzzi companies is that there was only one partnership. It owned the home office in Florence and all the branches abroad.”; de Roover (1963, p. 77).

<sup>15</sup>More closely with diagrams, de Roover (1963, p. 81): “In studying the organization of the Medici Bank, one cannot fail to notice how closely it resembles that of a holding company.”

<sup>16</sup>See de Roover (1946, p. 29), explaining: “[T]he Medici banking house was not one partnership but a combination of partnerships. A separate partnership was formed for each of the Medici enterprises. The ‘bank’ or home office in Florence, the branches abroad, and the three industrial establishments in Florence.”

<sup>17</sup>Reprinted in Grunzweig (1931, p. 53 et seq.); also in Gutkind (1938, p. 308 et seq.); in-depth analysis bei Fleischer (2021a, p. 97 et seq.).

<sup>18</sup>See Fleischer (2021c: § 1 marg. no. 91 et seq.); further Goldthwaite (2009, p. 67), explaining that the *accomenda* never realized its potential for evolving into something like a joint stock company; further Hawk (2016, p. 238): “However, the *accomandita* never became widely accepted. Other than by the Medici Bank, it appears that it was infrequently used. From the late 15th century to the 1530s, fewer than six *accomandita* contracts, on the average, were registered annually.”

any further liability (see de Roover, 1963, pp. 43 and 89 et seq.). After decades of economic prosperity and political influence, adverse political circumstances led to the decline of the bank and the expulsion of the Medici from Florence in 1494.

Just in the year in which the Banco Medici collapsed, the brothers Ulrich, Georg, and Jakob Fugger associated themselves in southern Germany to form a family business. Their partnership agreement of August 18, 1494,<sup>19</sup> which has been called the “Basic Law of Fugger Trade” (Pölnitz, 1949, p. 58) is considered one of the first ever commercial partnership contracts (*offene Handelsgesellschaft, OHG*) in Germany. It was concluded under the name “Ulrich Fugger und gebrudere von Augsburg” with a term of six years. Restrictions on withdrawals, individual power of representation, a ban on competition and majority decisions in the event of disagreements testify to the will of the participants to place all individual forces at the service of the overall family business. A follow-up contract of 1502,<sup>20</sup> in a special agreement on Hungarian trade, for the first time restricted the succession of partners to the “male line” of one’s own family.<sup>21</sup> In the event of the death of a partner, the survivors were to continue the trade, pay out the female descendants of the deceased and prepare the fittest among their sons for future participation in the management. With the death of Georg and Ulrich Fugger, the partnership of three brothers with equal rights came to an end; Jakob Fugger (1459–1525), as the last remaining partner, was entitled to continue the partnership on his own. He then concluded a new partnership agreement with his four nephews in 1512 under the name “Jacob Fugger und seiner gebrueder süne,” which reserved him the right to set the profit shares, exclude partners and dissolve the company.<sup>22</sup> Until his death, he was the most powerful and politically influential banker in Europe – reverently called Jacob Fugger the Rich by his contemporaries.

### ***1.2.3. Family Firms in the 19th Century Between Partnerships and Corporations (Baring, Rockefeller)***

The next major developmental step occurred in the late 19th century with the introduction of new forms of limited liability companies. They had been longed for everywhere, especially by small entrepreneurs who were looking for a way to develop under the protective shield of limited liability (Fränkel, 1915, p. 17). In Germany, an urgent need for reform had been identified especially for family and hereditary companies, which the legislator largely satisfied with the GmbH Act of 1892.<sup>23</sup> In England, practical guides in the last quarter of the 19th century

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<sup>19</sup>Reprinted in Jansen (1910, p. 263 et seq.); in-depth analysis by Fleischer (2021b, p. 139 et seq.).

<sup>20</sup>Also printed in Jansen (1910, p. 270 et seq.).

<sup>21</sup>Häberlein (2006, p. 39) adds: “At the same time, the Fuggers were breaking with their own family history, because in the 15th century it had been women who had ensured the continuity of Fugger trade.”

<sup>22</sup>Reprinted in Jansen (1910, p. 289 et seq.).

<sup>23</sup>See Fleischer (2021c: Introduction, marg. no. 54); Fränkel (1915, p. 17).

contributed significantly to the popularization of the private company.<sup>24</sup> This new, but at first still legally unsecured, offer was used primarily by family companies, which converted their already existing small businesses into the legal form of a company.<sup>25</sup> The reasons for this were, to a large extent, to protect themselves from the disgrace of private insolvency by compartmentalizing their liability<sup>26</sup> – a danger that seemed all too real in view of the Great Depression of 1873–1896 in the late Victorian period (see [Ireland, 1984](#), p. 248). In addition, considerations of business succession played a role.<sup>27</sup> Both of these factors may also have guided the case in what is probably the most famous decision on English company law, *Salomon v Salomon*: In 1892, Aron Salomon had transformed his sole proprietorship shoemaking business in London into a company by acquiring his wife and his five eldest children as co-partners – in order to meet the minimum number of shareholders of seven – and endowing them with one share each, while he held 20,000 shares. The House of Lords ruled in 1897 that the privilege of limited liability was also available to such a company with nominee shareholders.<sup>28</sup>

However, it was not only smaller family businesses that discovered the attractiveness of limited liability, but also large business dynasties. One example is the famous Baring banking house, which was originally organized as a partnership. In 1890, defaults by Argentina and the withdrawal of considerable sums by the Russian government brought it to the brink of collapse putting all family partners in danger of having to assume unlimited liability with their private assets.<sup>29</sup> After this existential crisis was overcome with the help of the Bank of England and potent private banks, namely the Rothschilds, the company was converted into a limited liability company and henceforth traded under the name Baring Brothers and Company, Ltd. (see [Landes, 2006](#), p. 61).

On the other side of the Atlantic, the Rockefellers underwent a similar change of legal form under quite different circumstances. Their entrepreneurial rise in the oil business began in 1865 when John D. Rockefeller (1874–1960) teamed up with the English engineer John Andrews in Cleveland to form a partnership under the name “Rockefeller and Andrews” (see [Becht & DeLong, 2005](#), p. 626; [Charnow, 1998](#), p. 87 et seq.). Two years later, Henry M. Flagler joined them ([Charnow, 1998](#), p. 108). In view of their firm’s growing financial needs, they looked for

<sup>24</sup>For a pioneer publication, [Palmer \(1877\)](#).

<sup>25</sup>See [McQueen \(2010, p. 142 et seq.\)](#): “Many of these enterprises were conversions of existing family businesses. Conversions were quite often an attempt to revitalize a family firm that had exhausted family financial reserves or managerial talent.”

<sup>26</sup>See [McQueen \(2010, p. 221\)](#); previously, [Cottrell \(1980, p. 265\)](#).

<sup>27</sup>On this, [Harris \(2013, p. 369\)](#): “This motivation led hundreds of other family firms, moving from first-generation sole proprietorship to second-generation partnerships, to the corporate form.”; further [McQueen \(2010, p. 193\)](#).

<sup>28</sup>See *Salomon v Salomon* [1897] (HL) AC 22; for an in-depth and comparative law analysis, [Fleischer \(2016, p. 44 et seq.\)](#).

<sup>29</sup>See [Landes \(2006, p. 58\)](#), with the additional remark: “Unlimited liability then still meant just that, and the partners were liable by law to their last shilling and their last acre, not to mention houses, animals, paintings and furniture.”

ways to attract outside investors without losing control. The solution in 1870 was to convert their partnership into a joint stock corporation under Ohio law: the Standard Oil Company. It had a share capital of one million dollars, with the Rockefeller family holding 50% and Andrews and Flagler 13% each. Two years later, there was a large capital increase to a total of 3.5 million dollars (see Landes, 2006, p. 326). Because Standard Oil was not allowed to hold shares in other corporations under Ohio law, further legal restructuring became necessary in 1878, so a trust structure was devised.<sup>30</sup>

#### ***1.2.4. Family Firms and Plurality of Legal Forms in the 20th and 21st centuries (Merck, Bertelsmann)***

In the 20th and 21st centuries, the legal landscape of family businesses is characterized by an enormous diversity of legal forms. This is particularly true of German company law which recognizes a wide variety of organizational forms.<sup>31</sup> This multitude of basic types and combinations of types, which in Europe is only surpassed by Liechtenstein's creative spirit, is not only found in textbooks, but is lived practice – also and especially of family businesses.<sup>32</sup> These firms resort, albeit increasingly rarely, to the classic partnerships (commercial partnership [OHG], limited partnership [KG]). They make widespread use of the limited liability company (GmbH), both for small family businesses and for large companies (example: Robert Bosch GmbH). They use the stock corporation (AG) (example: Beiersdorf AG) and recently also the European Company (SE) (example: Freudenberg SE), which can be interesting for family businesses because of its optional monistic board structure. Occasionally, they also choose the partnership limited by shares (KGaA) because it allows family businesses to retain significant influence on the management of the company and at the same time take in non-family investors.<sup>33</sup> One example is the listed Merck KGaA in Darmstadt, about 70% of whose capital is held by E. Merck KG as general partner and about 30% by limited shareholders.

Moreover, type combinations are very popular in Germany, most prominently the limited partnership with a limited liability company as general partner (GmbH & Co. KG). It was and still is praised as the ideal legal form for traditional family businesses (see Binz & Sorg, 2011, p. 221; Fleischer & Wansleben, 2017, p. 642; Nietsch, 2016, p. 218). Some commentators even regard the large, cross-generational family limited partnership (“große generationsübergreifende Familien-KG”) as a normative real type that justifies the recognition of a special legal regime by the courts with extended contractual leeway for the family partners.<sup>34</sup>

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<sup>30</sup>On this and on further amendments, Becht and DeLong (2005, p. 627 et seq.).

<sup>31</sup>In-depth, Fleischer (2015, p. 128 et seq.).

<sup>32</sup>More detailed on the following with numerous examples from corporate practice, Lieder (2017, p. 31 et seq. [basic types], p. 50 et seq. [mixtures of types]).

<sup>33</sup>More closely, Reichert (2014, p. 1960 et seq.).

<sup>34</sup>In this sense, Ulmer (2010a, 2010b); critically, for example, Lieder (2017, p. 59 et seq.).

Family businesses have also newly discovered SE & Co. KGaA, a partnership limited by shares with a European company as general partner,<sup>35</sup> which is used by Germany's largest media company Bertelsmann, for example.

In contrast, many neighboring countries manage with far fewer legal forms and are also critical of combinations of types.<sup>36</sup> In Switzerland, KG and KGaA lead a shadowy existence, the GmbH & Co. KG is prohibited by law, so family businesses almost exclusively resort to the – very flexible – AG.<sup>37</sup> Austria has abolished the KGaA due to its practical insignificance, but has at least introduced the private foundation (*Privatstiftung*) as an alternative legal form for family businesses.<sup>38</sup> In terms of numbers, however, the GmbH continues to dominate. In France and England, the *société en commandite* and the limited partnership do not go beyond a niche existence for various reasons (see Fleischer & Wansleben, 2017, pp. 635 et seq., 641). Family businesses there operate predominantly as *société anonyme*, *société par actions simplifiée*, *société à responsabilité limitée* or as a UK company, large listed companies occasionally as *société en commandite par action*. In the United States, on the other hand, the family limited partnership plays a considerable role in succession planning for tax reasons<sup>39</sup>; however, family businesses in corporate form are the most common (see Drake, 2013, p. 390).

### 1.3. Family Constitutions Through the Ages

In order to improve the interaction between family and business, owner families today increasingly agree on a so-called family constitution. In this constitution, they document their collective canon of values and their company-related objectives.

#### 1.3.1. Early Precursors

At first glance, the management instrument of the family constitution breathes the spirit of the modern corporate governance debate. However, observers who are familiar with history will recognize striking parallels to intra-family regulations from earlier times.

##### 1.3.1.1. House Laws of the High Nobility (*Habsburg, Hohenzollern*)

The regulative guiding idea of bindingly defining the supporting principles and values of a family is already encountered in the so-called house laws of the late

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<sup>35</sup>More closely, Reichert (2014, p. 1964 et seq.).

<sup>36</sup>Comprehensive comparative law analysis for the GmbH & Co KG in Fleischer and Wansleben (2017).

<sup>37</sup>See Chenaux (2015); monograph by Premand (2010); previously, Vogel (1974).

<sup>38</sup>More closely, Kalss (2017, p. 22 et seq.) under the subheading “Concentration on a few legal forms.”

<sup>39</sup>See, for example, Schwidetzky (2007) under the heading “Family Limited Partnerships: The Beat Goes On”; in-depth, Drake (2013, pp. 334 et seq., 605 et seq.).

Middle Ages.<sup>40</sup> From the early 14th century onwards, families of the high nobility used them to lay down family and inheritance laws outside of general state law on the basis of the regulatory autonomy they had been granted. Their enactment probably goes back to the cooperative constitution of the high noble family with lordly duties, but their legal basis soon took a back seat to the determining will of the ruling head of the family.<sup>41</sup> In the center of this private princely law were regulations concerning the bearer of dynastic rule and its transfer in succession, mostly according to the principle of primogeniture, i.e., a first-born succession. In addition, there was the formation of special estates – the so-called *Familienfideikomnisse* (Ebert, 2008, p. 1503; Kalss & Probst, 2013: marg. no. 3/16 et seq.) – with the aim of preserving certain ancestral estates permanently and undivided for the family to increase its splendor. The authority to set up such estates was derived from the statutes of the higher nobility, otherwise from customary law, family observance or state law (thus Ebert, 2008, p. 1503). According to a recent body of literature, the continuity that house laws secured for the assets of nobility also offers valuable suggestions for today's entrepreneurial families (see von Thunen, 2016, p. 55; von Thunen, 2015, p. 55 et seq.).

Among the best-known house laws were those of the Habsburgs. Particularly worthy of mention are (a) the Ferdinandean House Rules of 1554 with their commitment to Catholicism; (b) the House Agreements of 1703, initially kept secret, among them the *Pactum mutuae successionis*, which were published by Charles VI in 1713 under the name Pragmatic Sanction (see Turba, 1913); and (c) the Imperial Austrian Family Statute of 1839, signed by Emperor Ferdinand I. and countersigned by State Chancellor Metternich.<sup>42</sup>

With the end of the monarchical forms of government – in Germany through the Weimar Imperial Constitution of August 1919 – the house laws of the former ruling imperial and royal houses became obsolete in terms of constitutional law.<sup>43</sup> At best, they could continue to have an effect as private-law contracts with the consent of all parties involved. A prime example is the House Law of the Prussian Hohenzollerns with its regulations on, among other things, marriage according to status.<sup>44</sup> Not long ago, the effectiveness of this law was disputed in the German courts: Louis Ferdinand, a grandson of the last German Emperor Wilhelm II., had declared in a notarial deed in 1961, with reference to the House Law of 1920 and an inheritance contract with his father of 1938, that he irrevocably renounced his right of inheritance in the event of his marriage to a spouse not deemed his equal according to the principles of the old house constitution. Later, a dispute

<sup>40</sup>Brief references to this in connection with the family constitution in Fleischer (ZIP 2016: 514); Iliou (2004, p. 163 et seq.); Hueck (2017, p. 13).

<sup>41</sup>See Brauner (2012, p. 806), with the addition that the house laws were also called *pactum*, *Ordnung*, *Statut*, or *constitutio*. For a collection of important house laws Schulze (1862–1883).

<sup>42</sup>Full text in Velde (1839).

<sup>43</sup>Thus BVerfG NJW 2004, 2008, 2011.

<sup>44</sup>Berner (1884, p. 78); also Schulze (1883, p. 754 et seq.) on the House Laws of the Princely House of Hohenzollern-Sigmaringen.

arose about the validity of this waiver. After 10 years of proceedings, the German Constitutional Court (BVerfG) ruled in 2004 that Hohenzollern's equality clause violated the heir's fundamental right to freedom of marriage under Art. 6 para. 1 of the Basic Law and was therefore immoral or contrary to good faith under §§ 138, 242 of the German Civil Code (BGB).<sup>45</sup>

### *1.3.1.2. Guidelines of the Moneyed Aristocracy (Rothschild, Peugeot, Schlumberger)*

What the higher nobility had demonstrated was later to find many imitators among the moneyed nobility. And as with the former, the unilateral establishment of rules by the patriarch also dominated. An impressive example from Germany is the Rothschilds, who worked their way up from their early beginnings in Frankfurt's Judengasse to become one of the world's most important banking dynasties. Their founder, Mayer Amschel Rothschild (1743–1812), concluded a 10-year non-cancellable partnership agreement with his sons on September 27, 1810, officially transferring his business to "Mayer Amschel Rothschild & Sons."<sup>46</sup> However, he remained first among equals (see [Backhaus, 2012](#), p. 147 et seq.; [Ferguson, 2002](#), p. 97). He alone was allowed to withdraw capital for the duration of the contract, he alone could hire and fire employees, and he reserved the final say in all business matters.<sup>47</sup> At the same time, the partnership agreement also contained modern elements, such as a distribution of profits according to capital shares, the principle of joint management and an arbitration clause for partnership disputes after Mayer Amschel's death. In his notarial will of September 17, 1812,<sup>48</sup> he once again recalled the basic rules for the management of the company that he had already formulated during his lifetime, above all the requirement of unbreakable harmony and community in all business dealings.<sup>49</sup> In harsh words, he also professed patrilineality, i.e., an exclusive succession through the male line.<sup>50</sup> Even then, this principle was by no means

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<sup>45</sup>See BVerfG NJW 2004, 2008.

<sup>46</sup>Reprinted in Berghoeffler (1923, p. 194 et seq.).

<sup>47</sup>The relevant clause read: "Just as Mr Meyer Amschel Rothschild, with the help of the Most High, has laid the foundation of the present business through his diligence, insight and restless activity alone, which he has demonstrated from his youth onwards [...], so it is certainly of the highest fairness that he should retain himself as the actual head and present associate of the business, but in particular that he should reserve the decisive vote in all transactions [...]."

<sup>48</sup>Also printed in Berghoeffler (1923, p. 201 et seq.).

<sup>49</sup>Insistently, Ferguson (2002, p. 103 et seq.); also Backhaus (2012, p. 153): "The fraternal unity and the maxims of the father also became the central feature of the Rothschilds' external image."

<sup>50</sup>It literally read: "I decree and will [...] that my daughters and daughters' husbands and their heirs have no share in the business existing under the name of 'Mayer Amschel Rothschild and Sons' [...]. I would never be able to forgive one of my children if, against my father's will, they were to allow themselves to disturb my sons in the quiet possession of their business."

self-evident,<sup>51</sup> but from then on it remained an “iron law” (Backhaus, 2012, p. 152) of the Rothschild banks in Frankfurt, London, Paris, Vienna, and Naples. Unspoken, but unmistakable, his will finally contained another core demand: the family should remain Jewish and marry Jewish (Landes, 2006, p. 89).

Distinctive dynastic ideas also existed later in many industrialist families of the 19th and 20th centuries. One example from France is the Peugeotts, who had converted their original bicycle production in the Société Peugeot Frères to cars in 1890. Their great patriarch Robert Peugeot (1873–1945), called “Monsieur Robert,”<sup>52</sup> drew up a catalogue of rules in the 1930s to avoid splitting up the family fortune: (a) As with the Rothschilds, company shares could only be inherited by sons, never by daughters or sons-in-law; (b) all sons had to immediately reinvest their profits as partners in the company and should therefore earn other income in addition to their investment income, whether in the family business or elsewhere; (c) all sons were given a seat and a vote on the board of the family holding company “Les Fils de Peugeot Frères”; their voting rights were initially restricted, but these restrictions were removed as they grew in age and experience; attendance at one of the *grandes écoles* accelerated this process.<sup>53</sup> Based on these guidelines, Robert Peugeot led the third-generation business family with iron rigor,<sup>54</sup> but treated workers and employees extraordinarily generously in order to create in them a sense of attachment to the family.

Also illuminating is an episode from the Schlumberger business dynasty, which originally came from Alsace and made its money in textiles before succeeding in the oil industry in the United States after the Second World War. One of its co-founders, Jules-Albert Schlumberger (1804–1892),<sup>55</sup> recorded in his notebook as a young man in 1829 some guidelines that he considered essential for a family business: (a) no partnership agreement without a binding obligation to make a rigorous and accurate annual inventory; (b) binding determination of the amount that each partner is allowed to withdraw per year; (c) partners must inform each other of everything that is important; (d) outside capital is not to be accepted or borrowed; if the need does arise, it must be repaid as quickly as possible; (e) no carriages or horses for the household of salaried employees, they can walk; in addition, they must also pay for all things that they take from the business: oil, vinegar, wood, coal, sugar, etc.<sup>56</sup>

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<sup>51</sup>See Backhaus (2012, p. 150): “In the Jewry of the 18th century it was quite common for wives to continue their husband’s business as widows or for daughters to be taken in as equal partners and help run the business.”

<sup>52</sup>Sédillot (1960, p. 119): “Le grand patron: Monsieur Robert.”

<sup>53</sup>For more details, Landes (2006, p. 270 et seq.).

<sup>54</sup>On his management philosophy, Landes (2006, p. 271): “After Monsieur Robert had put these guidelines into effect, he ruled over the company and the family as an absolute monarch. Every day, wrapped in his cape, he visited workshops and factory halls. There could be no secrets – he wanted to know everything.”

<sup>55</sup>On him, Teissonniere-Jestin (1989, p. 158 et seq.).

<sup>56</sup>Landes (2006, p. 374 et seq.), adding: “This was a charter for a family business that took itself seriously – not a project on the off chance, but a sensibly calculated ensemble of capital and human labour.”

### 1.3.2. Modern Variations

In a new guise, the family constitution has been celebrating a rebirth since the 1990s. The core themes have remained the same: It is still about intra-family guidelines with reference to company, family or inheritance law.<sup>57</sup> What has changed above all is the way in which these values and objectives are defined. Whereas in the past it was the patriarchs from the high or moneyed nobility who unilaterally decreed the rules, today they are set in a joint process involving all family members.<sup>58</sup> According to the self-assessment of the family members and the observations of their professional advisors, the creation process is at least as important as the result.<sup>59</sup>

The content and form of the family constitution vary nationally and internationally. There is no such thing as “the” family constitution in the sense of a uniform model. Rather, different models and types can be found, depending on whether the family constitution is primarily conceived as (a) an instrument of strategic planning, (b) an internal family corporate governance code, or (c) a gap-filler for inadequate inheritance and family law. Five comparative law miniatures are intended to illustrate the forces that have contributed to its dissemination and the extent to which legal scholarship has already taken note of it.<sup>60</sup>

#### 1.3.2.1. United States: Family Constitution

In the United States, the initial impetus for the development of a family constitution came from recommendations in management literature. John Ward of the Kellogg School of Management who first introduced the tools of strategic planning to family businesses in the late 1980s is considered the mastermind (see [Ward, 1986](#); [Ward, 1988](#)). Together with his colleague Miguel Ángel Gallo from Barcelona, he coined the term family constitution in its Spanish version as *protocolo familiar* ([Ward & Gallo, 1992](#)). A book written together with Daniela Montemerlo in 2005 then compiled practical experience with the development of a family constitution in more than 80 families (see [Montemerlo & Ward, 2005](#)).

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<sup>57</sup>Fundamental Kalls and Probst (2013, p. 115 et seq.): Corporate Law for Family Businesses, Family Law for Entrepreneurial Families, Inheritance Law for Family Businesses.

<sup>58</sup>So also from the perspective of counseling practice, May and Ebel (2017, p. 101 et seq.): “The bourgeois-patriarchal age has perished and with it patriarchal authority. Tradition and authority have lost their binding force. Anyone who wants to establish continuity in family entrepreneurship today must generate enthusiasm for the joint project”; on individual residual cases in which the business leader writes the essential rules alone and brings them to the attention of the entire family, Hueck (2017, p. 12).

<sup>59</sup>See, for example, the experience report by Gloger (2017, p. 113) under the heading “The path is already part of the goal”; from the consultant perspective, May and Ebel (2017, p. 102).

<sup>60</sup>The following in addition to and in deepening of Fleischer (2016, p. 1510 et seq.).

The US legal literature has hardly dealt with family businesses.<sup>61</sup> Relevant (practitioner) guides deal almost exclusively with succession and tax planning as well as buy-sell agreements among family shareholders.<sup>62</sup> In academia, too, family business law has not yet formed an independent field of research.<sup>63</sup> The findings on the legal nature of family constitutions are even more scanty: They consist of no more than a single sentence of a recently published journal article that refers to the will of the parties involved.<sup>64</sup>

### 1.3.2.2. France: *Pacte familial*

In France, the family constitution has developed very hesitantly and selectively. The *pacte familial* of the Mulliez family of entrepreneurs, still one of the richest families in France, from 1955 is considered a harbinger. When the founder of the company, Louis Mulliez-Lestienne, died in 1952 without settling his estate, his descendants continued the business together and in 1955 cast their family togetherness into a family pact (Gobin, 2006, p. 160). In doing so, they secured the support of four top-class economic, financial, and legal advisors, among them Stephan Cambien, professor of economics in Lille (Gobin, 2006, p. 163 et seq.). Details of this *pacte de famille* which still exists today in its updated form remained hidden from the prying eyes of the public – true to the family motto “Pour vivre heureux, vivons cachés.”

French scholarship has so far paid little attention to the *pacte familial*. Some authors distinguish it from the *pacte d'associés* as a mere gentlemen's agreement (thus Blondel, 2010, p. 17 et seq.); others argue that, depending on the wording, its provisions could have legal effects.<sup>65</sup> Therefore, they argue, there is no way around a careful examination of the individual case. Moreover, they put the *pacte familial* in relation to the prohibition of contracts on a future inheritance in French law (see Le Nabasque et al., 1992, p. 247 et seq.). In 2015, the Paris Court of Appeal used the content of a *protocole familial* to interpret the partnership agreement.<sup>66</sup>

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<sup>61</sup>On point recently, Friedman et al. (2017, p. 426): “[F]amily businesses have received woefully insufficient attention from the legal profession with respect to their unique planning needs.”

<sup>62</sup>For individual references, Friedman et al. (2017, p. 427 with fn. 9).

<sup>63</sup>For a first approach, Means (2014); approvingly Smith (2016, p. 31): “Family-business law is not a ‘law of the horse’ but governs a distinctive factual context at the intersection of two important legal forms – the family and the business organization – each of which is animated by its own set of policies and regulated by its own set of rules.”

<sup>64</sup>See Friedman et al. (2017, p. 458): “While every family can decide for itself, most families who create family constitutions do not intend the document to have legal consequences; they are, however, intended to be ‘morally enforceable’ and become a meaningful piece of a family’s culture.”; not relevant despite a promising title, McClain (2006).

<sup>65</sup>In this sense, Le Nabasque et al. (1992, p. 288 et seq.).

<sup>66</sup>See CA Paris, June 19, 2015, Rev. soc. 2015, 734.

1.3.2.3. Spain: *Protocolo familiar*

In Spain, the origins of the *protocolo familiar* are partly traced back to US management literature,<sup>67</sup> and partly it is thought to have reached domestic consulting practice via French models.<sup>68</sup> Today, the family protocol is mentioned in various governance codes for unlisted companies and family businesses. In a *Real Decreto* of 2007, the legislator gave it a sector-specific legal definition and created the possibility for companies outside the capital market to disclose the entire protocol or individual regulations in the commercial register.<sup>69</sup>

Legal practice and scholarship have already dealt extensively with the family protocol. According to prevailing scholarly opinion, its regulatory nature and its legal effects cannot be uniformly determined (see Diez Soto, 2010, p. 174). Rather, the *protocolo familiar* can contain non-binding declarations of intent and values as well as legally binding regulations (see Diez Soto, 2010, p. 174; del Pozo, 2008, p. 153 with fn. 39; Valmaña Cabanes, 2013, p. 106). According to some authors, it can also be used to interpret the articles of association.<sup>70</sup> The aforementioned *Real Decreto* of 2007 equates the *protocolo familiar* with the *pacto parasocial*, the Spanish version of the shareholder agreement, but also leaves room for alternative arrangements.

1.3.2.4. Belgium: *Charte Familiale*

In Belgium, the idea of a family constitution has received significant impetus from the general corporate governance debate. Immediately after the Belgian Corporate Governance Code for listed companies was introduced in December 2004, a commission of experts drew up another set of recommendations for unlisted companies. This code, also known as the *Code Buyse*, recommends that family businesses draw up a family charter (*charte familiale*, *familiaal charter*) and explicitly advises that it be binding in nature.<sup>71</sup>

The specific legal aspects of the family charter are only dealt with in passing.<sup>72</sup> However, reference is made to a judgment of the Court of Appeal in Brussels in 1999 concerning a company between three brothers from the tourism industry. Before founding the company, they had concluded an “accord de fonctionnement” which provided for a basic division of tasks between them. When the brothers later got into a dispute, the court ordered two brothers who had disregarded this agreement to buy out their third brother’s shares at a price fixed by

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<sup>67</sup>In this sense, Diez Soto (2010, p. 167).

<sup>68</sup>In this sense, Valmaña Cabanes (2013, p. 103 et seq.).

<sup>69</sup>See Royal Decree 171/2007, of 9 February, which regulates the publicity of family protocols.

<sup>70</sup>In this sense, del Pozo (2008, p. 168).

<sup>71</sup>See Code Buyse, Corporate Governance. Recommendations à l’attention des entreprises non cotées en bourse, 2nd ed. 2009, para. 9.5; see Laleman (2010, p. 10), pointing out that many charters nevertheless limit themselves to legally non-binding guidelines.

<sup>72</sup>So explicitly Lievens (2009, p. 23): “stiefmoederlijk behandeld.”

the court.<sup>73</sup> Such a compulsory acquisition for good cause has been known in Belgian company law since 1996. With reference to this ruling, it is assumed in the literature that a family constitution can also have legal effects.<sup>74</sup>

#### 1.3.2.5. Germany: *Familienverfassung*

In Germany, the Governance Code for Family Businesses (GKFU) was an important stimulus for the family constitution. It was created in 2004 on the basis of a private initiative and has been available in its third edition since May 2015. According to its preamble, it aims to help owner families ask the relevant questions and find individual answers tailored to the respective situation of the business and the family. Among other things, it recommends that they draw up their own governance code<sup>75</sup> and also regulate “the legal quality of the code and its contents, especially in relation to articles of association and other legal documents.”<sup>76</sup>

There is now no shortage of practice-related literature on the family constitution.<sup>77</sup> However, there is a need to catch up with regard to its doctrinal classification. The state of research is still in its infancy (Hueck, 2017, p. 70), even though the degree of legal inquiry has been rising sharply recently. We will return to the details later.<sup>78</sup>

#### 1.3.2.6. Italy: *Patto di famiglia*

In Italy, management literature has focused more on family agreements as an instrument of strategic planning since the turn of the millennium. Terminologically, they were and are referred to as *patti di famiglia* (see, for example, Tomasselli, 2006). Under the same designation, the civil legislator created a new type of contract in Art. 768-bis of the *Codice civile* in 2008, which allows for the early transfer of family businesses contrary to the fundamental prohibition of agreements on succession.<sup>79</sup>

In terms of company law, the phenomenon of the *patto di famiglia* in the sense of management theory has hardly been dealt with. Occasionally, one reads that it can gain significance as a secondary agreement under the law of obligations (*patto parasociale*) (see Adducci, 2007, p. 98 et seq.; Zanchi, 2011, pp. 89 et seq., 122 et seq.).

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<sup>73</sup>See CA Brussels, April 20, 1999, *Tijdschrift voor Rechtspersoon en Vennootschap* 1999, 431.

<sup>74</sup>See Lievens (2009, p. 77), under the heading “A family charter can have legal effect” and (2009, p. 81): “The importance of this judgement cannot be underestimated for the practice of family businesses. It undeniably gives legal force to agreements that have hitherto been in the realm of declarations of intent and good intentions. Family charters now have teeth”; before that already Lievens (2004).

<sup>75</sup>See point 8.1 GKFU.

<sup>76</sup>See point 8.4 GKFU.

<sup>77</sup>For a list of relevant sources, Hueck (2017, p. 5 with fn. 1).

<sup>78</sup>For more details, see below 1.4.5.

<sup>79</sup>For a comparative analysis, see Kindler (2007, p. 954) and Kratzer (2009).

## 1.4. Family Constitutions within the Governance Framework for Family Firms

The governance framework for family firms has to coordinate three overlapping and interacting social subsystems, each with their own needs, expectations, and responsibilities: ownership, family, and business.<sup>80</sup> It usually consists of a series of layers that are at times corporate, contractual or non-normative in nature.<sup>81</sup> These layers together make up the whole, summoning up the image of the layers of an onion.

### 1.4.1. Statutes

Statutes are necessarily the first port of call for regulation in the legal framework for family firms. They offer a governance pattern with varying levels of flexibility depending on the type of company in question. In Germany, the Stock Corporation Act (AktG) provides the least room to maneuver with the iron principle of statutory stringency enshrined in § 23 para. 5.<sup>82</sup> This explains why German family firms aiming to access the capital market are increasingly turning from the rigid corset of the stock corporation (AG) to the softer vestments of a partnership limited by shares (KGaA), a European Company (SE) or a hybrid SE & Co. KGaA.<sup>83</sup>

### 1.4.2. Articles of Association

Usually, the most important rules governing family partnerships and limited liability firms are found in the articles of association rather than legislation. According to § 109 German Commercial Code (HGB) and § 45 para. 1 German Limited Liability Company Act (GmbHG), shareholders can set up tailor-made organizational structures in family firms and establish the ownership rights according to their specific needs. This is complimented by the creation of additional corporate organs, for example an advisory board made up of non-family members.

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<sup>80</sup>Perfectly captured in the three-circle model by Tagiuri and Davis (1992, p. 49); see also Tagiuri and Davis (1996).

<sup>81</sup>In more detail, Kalss and Probst (2013: marg. no. 4/1 et seq.). Generally on the many-layered governance framework for closed corporations, Fleischer (2017, p. 319); also, but with some differences, McCahery and Vermeulen (2008, p. 5 et seq.), explaining that the three pillars of the governance framework differentiate between company law, contract and optional guidelines.

<sup>82</sup>From a comparative perspective, see Rothärmel (2006).

<sup>83</sup>In more detail, Lieder (2017, p. 37). The situation is different for example in Switzerland, where family businesses are primarily organized as stock corporations, see Premand (2010).

### 1.4.3. Shareholder Agreements

In addition to the relevant legislation and the articles of association, shareholder agreements may also contain provisions on corporate governance in the family firm. Their most significant items include voting rights agreements, transfer restrictions, pre-emptory purchase rights and agreements regarding the composition of the various corporate organs. From a strictly legal perspective, these are independent agreements between some or all shareholders that operate *alongside* the articles of association, something the nomenclature in other languages makes clear, such as the Italian *patti parasociali* and the Spanish *pactos parasociales*. The relationship here is purely contractual, and in contrast to the articles of association, can only be altered with unanimous agreement, rather than a qualified majority. The contents of these agreements, and even their very existence is usually shielded from the curious gaze of the outside world; they remain “the invisible side of the moon.”<sup>84</sup>

### 1.4.4. Codes of Governance for Family Firms

Codes of corporate governance provide a further layer of regulation that has already reached the privately held limited liability corporation (Konnertz-Häusler, 2012) and the family firm.<sup>85</sup> The main instrument in Germany is the “Governance Code for Family Businesses” mentioned above.<sup>86</sup> In legal terms, it is distinct from the German Corporate Governance Code for listed companies in that it, *inter alia*, lacks a statutory comply-or-explain mechanism like that of § 161 AktG.

### 1.4.5. Family Constitution

Last, but by no means least, the family constitution has begun to appear more frequently under a slew of terminology, including family charter, family protocol, or family code. In substance, it is a written document in which the owner family commits to paper their collective values and commercial goals for their ownership, family and business. The family constitution differs from the articles of association and shareholder agreements in two ways: It is usually signed by all family members – shareholder and non-shareholder alike; and, according to widely held opinion, it is not legally binding on its signatories, representing only a moral obligation.<sup>87</sup> Whether this assessment is legally accurate under German law is addressed in the next section.

<sup>84</sup>Forstmoser (2004, p. 501), playing on a poem by Matthias Claudius.

<sup>85</sup>Hirsch (2011, p. 126 et seq.): “Starting in the early 2000s with just a few countries engaged, the list of corporate governance guidelines including or focusing on family businesses is steadily expanding at national as well as international policy levels.”

<sup>86</sup>See above 1.3.2.5.

<sup>87</sup>See, for example, Baus (2010, p. 137) and Felden and Hack (2014, p. 321).

## 1.5. Family Constitutions in the Light of German Company Law

Regarding the possible legal effects of a family constitution, the recent discussion in Germany has gained enormous momentum and depth. Three lines of development are emerging which can be succinctly described as the juridification, theorization, and standardization of the family constitution.

### 1.5.1. Juridification of the Family Constitution

Among professional non-legal advisors, it was considered common wisdom that the family constitution is located in the pre-legal sphere: It is a mere declaration of intent<sup>88</sup> without legally binding effect,<sup>89</sup> neither enforceable nor executable (thus [Lange, 2013](#), p. 44), even a legal nullity ([Bause, 2010](#), p. 140).

This view, which has remained unchallenged for a long time, has recently been called into question by legal experts, and rightly so (see [Fleischer, 2016](#), p. 1515 et seq.; [Hueck, 2017](#), p. 70 et seq.; [Kalss, 2014](#), p. 350 et seq.; [Kalss & Probst, 2013](#), marg. no. 3/21 et seq.; [Kirchdörfer & Breyer, 2014](#), p. 21 et seq.; [Uffmann, 2015](#), p. 2441). Their observation that there is no such thing as “the” family constitution speaks for itself (see [Fleischer, 2016](#), p. 1515; [Hueck, 2017](#), p. 78). Instead, very different variations are encountered in practice. In view of this diversity of types at home and abroad, the sweeping judgment that a family constitution cannot a priori have any legal effect is far too undifferentiated. Rather, there is no way around a careful examination of their legal nature in individual cases (see [Fleischer, 2016](#), p. 1515; [Claussen & Waldens, 2017](#), p. 129 et seq.). Such a differential diagnosis is also considered necessary by scholarly contributions from Spain and France.<sup>90</sup> The first German monograph on the family constitution recently points in the same direction (see [Hueck, 2017](#), p. 335 et seq. (summary)).

As an interim finding, one can therefore state that the juridification of the family constitution has begun – not in the sense of a hostile land grab, but as a faithful exploration and determination of the actual will of the family members so as to classify this expression of will in the existing categories of law.<sup>91</sup> Professional

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<sup>88</sup>For example, see [Kellersmann and Winkeljohann \(2007, p. 411\)](#) and [Schulze and Werz \(2007, p. 313\)](#).

<sup>89</sup>See, for example, [Heigl \(2016, p. 42\)](#): “A family constitution is never legally binding, as it is not prescribed and there is also no prescribed form for it.”

<sup>90</sup>For Spain, see fn. 101; for France, see fn. 94.

<sup>91</sup>On this from contractual practice, for example, [Claussen and Waldens \(2017, p. 131\)](#): “However, a legal non-binding nature cannot be achieved in all cases with this, but is also unlikely to correspond to the actual will of the participating family members”; from an academic perspective, [Hueck \(2017, p. 203 et seq.\)](#) under the subheading “Compatibility of a legal relevance of the family constitution with the will of the family shareholders.”

advisors and owner families must therefore already deal with the possible legal effects of a family constitution during the drafting process, and they are increasingly doing so.<sup>92</sup> It is also to be welcomed that the German Governance Code for Family Businesses, in its latest version of 2015, raises awareness of the problems faced by owner families in this respect.<sup>93</sup>

### 1.5.2. Theorization of the Family Constitution

For company law scholarship, this poses the task of dogmatizing the family constitution. In other words, it must be integrated into the doctrinal framework of contract and company law. Again, a one-size-fits-all solution is not convincing. Depending on the case, the family constitution can be classified in different categories, which can be of a corporate, contractual or non-normative nature.<sup>94</sup> It is conceivable but rather rare, that the family constitution is raised to the corporate level by a shareholders' resolution.<sup>95</sup> Occasionally, it may turn out to be a shareholders' agreement under the law of obligations, which applies (only) between the contracting parties, but is not subject to publicity in the commercial register (see Fleischer, 2016, p. 1515). This possibility is explicitly mentioned in French, Spanish, and Belgian literature.<sup>96</sup> Probably even more frequently, the family constitution will be a so-called moral obligation, which goes beyond a mere social relationship but does not yet attain the quality of a contract (see Fleischer, 2016, p. 1516; Hueck, 2017, pp. 183 et seq., 192 et seq.). There is a remarkable degree of agreement across national borders that it could be described as a gentlemen's agreement, *pacto de caballeros* or *patto tra gentiluomini*.<sup>97</sup> Finally, it may be that in a specific case there is only a social agreement below the threshold of legal relevance (see Fleischer, 2016, p. 1516; Hueck, 2017, p. 180 et seq.).

From a direct legally binding effect, one has to separate indirect legal effects,<sup>98</sup> for which various doctrinal paths of transmission are available.<sup>99</sup> It is conceivable that individual provisions of a family constitution may become valid by virtue of internal company practice, either as derogating or as explanatory or

<sup>92</sup>Most recently, for example, Claussen and Waldens (2017, p. 128 et seq.) under the subheading "Legal quality and legal effects of the Code."

<sup>93</sup>See the text and the reference in fn. 108.

<sup>94</sup>On the "onion-skin model" of governance regulations in family businesses Fleischer (2016, p. 1509 et seq.).

<sup>95</sup>See Hueck (2017, p. 118 et seq.), for further references.

<sup>96</sup>See for France, Dom (1998: marg. no. 263); for Spain, del Pozo (2007: marg. no. 29, 139, 143 et seq.); for Belgium, Lievens (2009, p. 73 et seq.).

<sup>97</sup>See for France, Blondel (2010, p. 17 et seq.); for Italy, Tomaselli (2006, p. 28); for Spain, del Pozo (2007, p. 153 with fn. 39).

<sup>98</sup>Very clearly, Hueck (2017, pp. 129 et seq. [direct legal effect], 197 et seq. [indirect legal effects]).

<sup>99</sup>For more details, Fleischer (2016, p. 1517 et seq.); T. Hueck (2017, p. 201 et seq.); Uffmann (2015, p. 2450).

supplementary observance (see [Fleischer, 2016](#), p. 1517; [Hueck, 2017](#), p. 99). Incidentally, the high nobility already had similar house observances to accompany their house laws (see [von Thunen, 2015](#), p. 39). In addition, a family constitution can be used as a tool to interpret or supplement the partnership agreement (see [Claussen & Waldens, 2017](#), p. 130; [Fleischer, 2016](#), p. 1517 et seq.; [Hennerkes & Kirchdörfer, 2015](#), p. 65; [Hueck, 2017](#), p. 252 et seq.; [Kalss & Probst, 2013](#), marg. no. 4/115 et seq.). As mentioned above, this is what the Paris Court of Appeal recently did.<sup>100</sup> Those who wish to strengthen this effect may think of including the family constitution in the preamble of the articles of association or at least mentioning it there (see [Fleischer, 2016](#), p. 1518; [T. Hueck, 2017](#), p. 204; [Kalss & Probst, 2013](#), marg. no. 4/117 et seq.). Finally, the family constitution may be relevant for the concretization of the shareholders' duty of loyalty vis-à-vis the company or their fellow shareholders.<sup>101</sup> This was already indicated by the German Federal Court of Justice in 1968,<sup>102</sup> and in Belgium the cited ruling of the Brussels Court of Appeal in 1999 provides valuable illustrative material.<sup>103</sup> In this context, the family constitution is particularly informative because it spells out the legitimate expectations of family members and thus contributes helpful standards for managing intra-family conflicts.<sup>104</sup>

### *1.5.3. Standardization of the Family Constitution*

The gradual maturing process of the family constitution can, over the course of time, produce certain types of constitutions to which concrete legal effects can be assigned or which precisely avoid such juridification. In banking and commercial law, for example, the comfort letter has undergone a similar process of standardization over time, resulting in a hard and a soft version, each with its own legal consequences.<sup>105</sup> For the family constitution, the value of standardization would lie above all in giving the owner family and its advisors a more reliable orientation as to which types they must use in order to achieve the degree of commitment they may desire.<sup>106</sup>

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<sup>100</sup>See the text and the references in fn. 108.

<sup>101</sup>See [Claussen and Waldens \(2017, p. 130\)](#); [Fleischer \(2016, p. 1518 et seq.\)](#); [Hueck \(2017, p. 267 et seq.\)](#); [Kalss and Probst \(2013; marg. no. 4/122 et seq.\)](#).

<sup>102</sup>BGHZ 51, 204, 206.

<sup>103</sup>See the text and the references in fn. 105.

<sup>104</sup>See from a management perspective also [Mengers and Prigge \(2017, p. 93\)](#): “The elaboration of the content of a family constitution thus represents the step from purely so-called psychological contracts, which mostly each person keeps to himself, to a general consensus within the family and the business”; conceptually on organizational justice in family businesses [Botero et al. \(2015\)](#).

<sup>105</sup>In detail on the gradual differentiation between hard and soft letters of comfort [Koch \(2005, pp. 11 et seq., 23 et seq.\)](#).

<sup>106</sup>On various legal design options also [Hueck \(2017, p. 313 et seq.\)](#).

## 1.6. Key Findings

1. Family businesses have shaped partnership and company law from its earliest beginnings. The cradle of the ancient Roman *societas* was the house community continued by the heirs of the *paterfamilias* which was often also referred to as the community of brothers (*societas fratrum*).
2. In the Middle Ages, family businesses acted as promoters of the *compagnia*, *accomenda* and *oHG*. The Medici, for example, made use of the *compagnia* – literally: community of bread – in the 14th century when they founded their Florentine banking house, which was organized as a group of partnerships. They also made use of the *accomenda*, which a Florentine law of 1408 had made available to them. In Southern Germany, the partnership agreement of the brothers Ulrich, Georg, and Jakob Fugger of 1494 formed one of the first ever commercial partnership contracts.
3. The next major leap forward came in the late 19th century with the introduction of new forms of limited liability companies. In Germany, an urgent need for reform had been identified, especially for family and hereditary companies, which the legislature took into account with the GmbH Act of 1892. In England, many family businesses converted their small business into a private company, which the House of Lords approved in the famous Salomon decision of 1897. The change of form from a partnership to a limited liability company was also undertaken by large business dynasties, for example the Baring banking house in England after a near collapse in 1890, and the Rockefellers in the United States in 1870 to tap new sources of finance.
4. In the 20th and 21st centuries, the picture of family companies in Germany is characterized by an enormous diversity of legal forms. In addition to the numerous basic types, including the KGaA (e.g., Merck), combinations of types have gained in popularity – from the GmbH & Co. KG to the SE & Co. KGaA (e.g., Bertelsmann). In contrast, many other jurisdictions manage with fewer legal forms and are also critical of type combinations.
5. Nowadays, more and more family businesses are supplementing their basic corporate legal framework with a so-called family constitution, in which they document their collective set of values and their company-related objectives. This modern control instrument has early predecessors in the so-called house laws of the late Middle Ages, with which families of the high nobility (e.g., Habsburg, Hohenzollern) established family and inheritance laws outside of state civil law. Patriarchs of the national and international moneyed aristocracy (e.g., Rothschild, Peugeot, Schlumberger) later did the same by establishing guidelines for their family business.
6. The core themes of today's family constitutions have largely remained the same with their references to company, family, and inheritance law. What has changed above all is the way in which these guidelines are established: They are no longer unilaterally decreed by the heads of the family of the high or moneyed aristocracy, but are consented to by all family members in a joint process. This process is often as significant as its outcome.

7. Family constitutions are not a purely German phenomenon, but an international one. They have gained a foothold in the United States (family constitution), France (*pacte familial*), Spain (*protocolo familiar*), Belgium (*charte familiale*), and Italy (*patto di famiglia*). Almost everywhere, they are still in the early stages of being worked out in terms of company law.
8. The view, long unchallenged in advisory circles, that a family constitution has no legal effect whatsoever, has recently been called into question by legal experts, and rightly so. Three lines of development are emerging, which can be succinctly described as juridification, theorization, and standardization of the family constitution. They are not intended as a hostile takeover of a field hitherto worked on mainly by business consultants, sociologists, and psychologists. Rather, it is an attempt to faithfully ascertain the actual will of family members and to adequately classify it in the categories of law.

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